



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 1

5 Post Office Square, Suite 100

Boston, MA 02109-3912

November 4, 2016

Honorable Ms. Rossana Rosado
Secretary of State
Department of State
State of New York
One Commerce Plaza
99 Washington Avenue
Albany, NY 12231-0001

Re: F-2016-0638 DA, EPA Response to the New York Department of State's Objection to EPA's Federal CZMA Consistency Determination for the Proposed Designation of the Eastern Long Island Sound Dredged Material Disposal Site

Dear Secretary of State Rosado:

The New England Office of the United States Environmental Protection Agency ("EPA") is designating a dredged material disposal site in Connecticut waters within the eastern region of Long Island Sound (the "Sound") under Sections 102(c) and 106(f) of the Marine Protection, Research, and Sanctuaries Act ("MPRSA"). 33 U.S.C. §§ 1412(c) and 1416(f). *See also* 40 C.F.R. §§ 228.4(e). The site will be named the Eastern Long Island Sound Disposal Site (the "ELDS"). In accordance with National Oceanic and Atmospheric Administration ("NOAA") regulations under the federal Coastal Zone Management Act ("CZMA"), *see* 15 C.F.R. § 930.43(e), EPA is hereby notifying the New York Department of State ("NY DOS") of its intent to proceed with designation of the ELDS.

In connection with proposing designation of the ELDS, I sent a letter dated July 20, 2016, to Jeffrey Zappieri of the New York Department of State ("NY DOS"), submitting the "EPA Region 1 Determination of Federal Action's Consistency with Enforceable Policies of New York's Coastal Zone Management Program (July 20, 2016)" ("the July 2016 Consistency Determination"). In this submission, EPA documented its determination that the proposed designation of the ELDS would be consistent to the maximum extent practicable with the enforceable policies of New York's Coastal Management Program ("NY CMP"), as it has been refined for local conditions by the Long Island Sound Coastal Management Program ("LIS CMP") and the Local Waterfront Revitalization Program ("LWRP") of the Town of Southold, New York.¹

¹ EPA also submitted CZMA consistency determinations to the States of Connecticut and Rhode Island with regard to the proposed designation of the ELDS. Both states have concurred with the EPA's determination with regard to their respective coastal zone management programs.

NY DOS's response to EPA's July 2016 Consistency Determination was due on October 3, 2016.² NY DOS objected to EPA's CZMA consistency determination in a letter to me dated October 3, 2016. On October 6, 2016, NY DOS sent EPA a "Corrected" version of its October 3, 2016, letter (the "NY DOS Objection").

EPA has fully reviewed and considered the October 6, 2016, version of the NY DOS Objection. EPA concludes that the arguments in the NY DOS Objection are unfounded. Moreover, having considered the Objection, EPA concludes under 15 C.F.R. § 930.43(d)(2) that its designation of the ELDS, as specified in the Final Rule, is in all respects fully consistent with the enforceable policies of New York's CMP, as refined by the Long Island Sound CMP and the Town of Southold's LWRP. EPA's determination is presented in the attached "EPA Response to NY DOS's CZMA Objection to EPA's Designation of the Eastern Long Island Sound Dredged Material Disposal Site (November 4, 2016)."

EPA expects the Final Rule to be published in the Federal Register during the week of November 14, 2016. The Final Rule states that it will become effective 30 days after the date of its publication. EPA will today, by separate email, provide you with a pre-publication copy of the Final Rule, EPA also expects early next week to provide NY DOS with electronic access to a copy of the EPA's Final Supplemental Environmental Impact Statement (the "FSEIS") supporting the designation of the ELDS, which includes, as Appendix J, EPA's responses to public comments submitted on the April 2016 Proposed Rule and the DSEIS.

EPA points out that in response to these public comments, including those from NY DOS, EPA made a number of modifications to the ELDS site designation for the Final Rule. EPA asks that NY DOS consider whether these modifications sufficiently resolve NY DOS's concerns to enable it to withdraw its objection under the CZMA. For example, the Region shifted the boundaries of the ELDS westward so that the site lies entirely outside of both New York state waters and the existing New London Disposal Site ("NLDS"), is farther from Fishers Island, New York, entirely avoids the submarine transit corridor into the Thames River, and excludes certain hard-bottom areas that could potentially provide relatively higher quality habitat for marine organisms. The boundary changes also reduce the overall size of the ELDS from 2.0 to 1.3 square nautical miles. In addition, by designating only the ELDS, EPA is allowing the NLDS and the existing Cornfield Shoals Disposal Site to close by operation of law on December 23, 2016, thus reducing the number of disposal sites in the eastern Sound from two to one.

As indicated in the Proposed Rule, EPA's site designation regulations will apply the same site use restrictions to the ELDS as are applied to the Central Long Island Sound and Western Long Island Sound Disposal Sites (the "CLDS" and "WLDS") in the central and western regions of Long Island Sound, respectively. *See* 81 Fed. Reg. 44229-44230 (July 7, 2016) (40 C.F.R. §§ 228.15(b)(4) and 228.15(b)(5)); 81 Fed. Reg. 24767 (proposed 40 C.F.R. § 228.15(b)(6)). Consistent with the terms of 40 C.F.R. § 228.15(b)(4)(vi), the purpose of the site use restrictions

² By letter dated September 16, 2016, from Gregory Capobianco of NY DOS to Melville P. Coté, Jr., of Region 1, NY DOS indicated that under federal regulations, it would take a 15-day extension of time for responding to the Region's July 2016 Consistency Determination, and that the response would be due on October 3, 2016.

is to reduce or eliminate the disposal of dredged material in the waters of Long Island Sound. The site use restrictions create procedures and standards to foster and facilitate achieving this goal, including by promoting the development and use of practicable beneficial use options through the activities of the Regional Dredging Team and Steering Committee. NY DOS was involved in the development of the site use restrictions and concurred that they were satisfactory under the New York CMP for the CLDS and WLDS site designations. Applying these site use restrictions to the ELDS should be equally acceptable because the restrictions apply equally well to the eastern Sound and applying the same restrictions across the entire Sound makes good sense. As a result, the entire Sound will be covered by the same regulatory regime applied by the same federal and state regulators. Moreover, the same procedures and standards will apply to promote the use of practicable beneficial use options and to reduce or eliminate dredged material disposal wherever practicable.

As EPA has explained before, designation of a disposal site does not authorize any particular dredged material to be placed at the site. It merely makes the site available as a potential management option for use in appropriate circumstances. Any proposal to place dredged material in the waters of Long Island Sound will be subject to a case-specific permitting review. Placement of dredged material at a designated disposal site can only be authorized if the sediments are deemed suitable for marine disposal – after physical, chemical and biological testing – and no practicable alternatives to open-water disposal are available. These requirements are expressly stated in the regulations. As previously noted, the regulations also include site use restrictions intended to reduce or eliminate dredged material disposal in the waters of Long Island Sound wherever practicable.

Again, EPA hopes that NY DOS will carefully review and consider the Final Rule in light of adjustments made from the Proposed Rule, as these adjustments may address many of the state's concerns.

As EPA has stated previously, the waters of Long Island Sound are a precious natural resource that provide immeasurable benefits to the people of our Nation, including residents of the States of New York and Connecticut. These waters provide invaluable habitat for aquatic life and a wonderful aesthetic and recreational resource to the public. They are also a crucial engine for the region's economy and an important factor in our national security planning. Our collective stewardship of Long Island Sound must serve all of these purposes and functions.

As the LIS CMP and the Southold LWRP recognize, dredging is needed to ensure safe navigation and adequate berthing space for vessels using the waters of Long Island Sound. It is critical, however, that dredging and dredged material management be conducted in an environmentally sound manner. EPA continues to conclude that designation of the ELDS gets the balance right in serving the multitude of interests mentioned above while also protecting the environment of Long Island Sound. In deciding to designate the ELDS with the specified site use restrictions, EPA has taken into account the input of private citizens, businesses, elected officials, and federal and state agencies, including NY DOS.

Finally, under 15 C.F.R. § 930.43(d) and 930.44, EPA considered whether to seek mediation assistance from NOAA or the Secretary of Commerce's office to address this CZMA dispute

with NY DOS, but the Region has decided against it. In the Objection (at p. 56), NY DOS warns that a "mediation process may be lengthy." EPA agrees with this assessment and rather than taking on additional delay, the Region finds that it is necessary to proceed with the site designation at this point. EPA has been working to determine whether to designate dredged material disposal sites in Long Island Sound for many years. Moreover, since EPA has chosen not to designate the NLDS or CSDS (which are also opposed by NY DOS), these two sites will close by operation of law on December 23, 2016. Therefore, after that date, unless designation of the ELDS goes forward, there will be no federally authorized dredged material disposal sites in the eastern region of Long Island Sound. This could pose a threat to safe navigation in the eastern Sound, whether for recreational, commercial, military or public safety purposes. It also could result in less than optimal environmental protection if, due to the absence of an authorized disposal site, dredged material has to be managed under emergency conditions. Furthermore, on August 4, 2016, New York Governor Andrew M. Cuomo wrote to President Barack Obama, EPA Administrator Regina McCarthy, and EPA Region 1 Regional Administrator H. Curtis Spalding, and threatened legal action to block the designation of *any* dredged material disposal site in the eastern region of Long Island Sound. Since that time, EPA has contacted NY DOS to discuss the site designation, but NY DOS has been unwilling to discuss the matter with EPA. Under these circumstances, EPA has decided not to pursue mediation through the Department of Commerce.

Thank you in advance for considering the points raised above and in the attached document. We are hopeful that we can maintain the constructive and productive working relationship that we have had in the past as we deal with these important and difficult issues. A positive working relationship will be important as our agencies, and others, work together on the Steering Committee and the Regional Dredging Team going forward.

If you have any questions regarding this letter, your staff may call Mel Côté, chief of EPA Region 1's Surface Water Branch at (617) 918-1553, and/or your legal counsel may call Senior Assistant Regional Counsel Mark Stein at (617) 918-1077.

Sincerely,



Kenneth Moraff, Director
Office of Ecosystem Protection

cc (by email): David Kaiser, NOAA
Kathleen Moser, NY DEC
Brian Thompson, CT DEEP
Col. Christopher J. Barron, USACE